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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 NOTICE IS HEREBY GIVEN that on May 10, 2018 at 9:00 AM, (or as soon thereafter as the
4 Court's schedule permits), before The Honorable Beth Labson Freeman of the United States District
5 Court for the Northern District of California, located at Courtroom 3, 280 South 1st Street, San Jose,
6 CA 95113, plaintiff Arista Networks, Inc. ("Arista") will, and hereby does, move this Court for an
7 order striking the first through seventh affirmative defenses of defendant Cisco Systems, Inc.
8 ("Cisco") and precluding Cisco from offering evidence of the same, and, alternatively or additionally,
9 granting partial judgment on the pleadings. This motion is based on this Notice of Motion and
10 Motion, the following arguments and cited authorities and exhibits, the Declaration of Robert Gerrity
11 in Support of Arista's Motion ("Gerrity Decl."), the pleadings and papers on file herein and in other
12 litigations between Cisco and Arista, any oral argument before the Court, and any other matters the
13 Court may request or consider.

STATEMENT OF RELIEF SOUGHT

15 Arista seeks an Order from the Court striking Cisco's first through seventh affirmative
16 defenses; precluding Cisco from offering evidence of patent infringement to show the fact of
17 infringement, the absence of antitrust injury, or to reduce damages; and granting partial judgment on
18 the pleadings that Arista does not lack antitrust injury and does not lack antitrust standing based on
19 patent infringement and that Arista does not lack antitrust standing based on the ITC Orders.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

22 After the Court issued its Order denying Cisco System, Inc.’s (“Cisco”) motion to dismiss
23 Arista’s antitrust claims for lack of standing based on findings of patent infringement and resulting
24 orders from the United States International Trade Commission (“ITC”), Cisco filed an Answer that
25 asserted, as a new affirmative defense to Arista’s claims, that Arista lacked standing and antitrust
26 injury based on patent infringement and the ITC orders. ECF No. 170, Answer to Amended
27 Complaint (“Answer”), ¶¶ 134-64. Cisco’s new “patent infringement” affirmative defense improperly
28 seeks to expand and transform this antitrust case into an eleven-patent infringement dispute,

1 duplicating litigation already underway in multiple other forums and requiring *this* court to oversee
 2 trial on infringement and validity of Cisco's patents as part of this antitrust case. There is no basis for
 3 Cisco to litigate those claims here.

4 First, not only is Cisco's first affirmative defense based on standing inconsistent with the
 5 Court's Order, but it should be stricken in its entirety because "lack of standing" is not an affirmative
 6 defense as a matter of law.

7 More fundamentally, permitting Cisco to assert patent infringement as a defense to antitrust
 8 standing and injury is inconsistent with the controlling Ninth Circuit authority, *Memorex Corp. v.*
 9 *IBM Corp.*, 555 F.2d 1379 (9th Cir. 1977). As this Court already observed, *Memorex* held that illegal
 10 acts by the plaintiff that are directed against the defendant are not a defense to an antitrust action. *Id.*
 11 at 1382-83; ECF No. 151, Order Granting In Part And Denying In Part Defendant's Motion To
 12 Dismiss With Leave To Amend ("Order") at 9-10 (quoting *Memorex*, 555 F.2d at 1382-83). While
 13 *Memorex* concerned assertions of trade secret misappropriation, Cisco's assertion of patent
 14 infringement by Arista as to a variety of patents related to optional switch features falls squarely
 15 within the reasoning of *Memorex* as conduct, even if proven true, that does not deprive an antitrust
 16 plaintiff of standing. As the Court recognized in its Order, none of the authority cited by Cisco to
 17 overcome *Memorex* supports a different result here.

18 Finally, Cisco's remaining affirmative defenses should be stricken for failing to meet the
 19 pleading standards, which require more than single sentences, each stating a legal conclusion.

20 Thus, Arista respectfully requests that Cisco's first affirmative defense be stricken; that Cisco
 21 be precluded from offering evidence of patent infringement to show infringement, to show the
 22 absence of antitrust injury, or to reduce damages; and that Arista be granted partial judgment on the
 23 pleadings that it does not lack antitrust standing or antitrust injury based on patent infringement and
 24 that it does not lack antitrust standing based on the ITC orders.

25 **II. STATEMENT OF ISSUES TO BE DECIDED**

26 1. Whether Cisco's first through seventh affirmative defenses should be stricken under
 27 Rule 12(f).

28 2. Whether, pursuant to *Memorex*, Cisco should be precluded from offering evidence of

1 patent infringement to show the fact of infringement, to show the absence of antitrust injury, or to
 2 reduce damages.

3 3. Whether the Court should grant partial judgment on the pleadings under Rule 12(c)
 4 that Arista does not lack antitrust injury and does not lack antitrust standing based on patent
 5 infringement.

6 **III. RELEVANT FACTUAL BACKGROUND**

7 **A. The Parties And The Present Litigation**

8 Cisco and Arista both sell Ethernet switches. ECF No. 162, Amended Complaint for Antitrust
 9 and Unfair Competition (“Amended Complaint”), ¶¶ 11, 18. Ethernet switches “are building blocks
 10 for business communications” that “may connect computers, servers, storage, and other devices
 11 together to form a network.” Answer, ¶ 11. For at least 15 years, Cisco dominated the market for
 12 Ethernet switches, with market shares always exceeding 50%, and at times exceeding 70%. Amended
 13 Complaint, ¶ 14. Arista released its first product in 2008, and its revolutionary Ethernet switches are
 14 being used in data centers of companies that provide financial services, social media, ecommerce,
 15 cloud computing, and scientific computing, as well as in many government agencies. *Id.*, ¶ 18. Cisco
 16 repeatedly tried and failed to counter Arista’s success, and turned to anticompetitive conduct to
 17 maintain its Ethernet switch monopoly. *Id.*, ¶¶ 20-22. Arista initiated the present litigation on
 18 February 24, 2016, for violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, and California’s
 19 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ECF No. 1, Complaint for Antitrust
 20 and Unfair Competition, ¶¶ 1; Amended Complaint, ¶ 1.

21 **B. Cisco’s Assertions of Patent Infringement By Arista Switches In Other 22 Proceedings And Arista’s Continued Participation in The Relevant Switch 23 Markets**

24 On December 5, 2014, Cisco filed a complaint for patent infringement against Arista in this
 25 district, accusing a variety of specific Arista switch features of infringing 12 of its patents. *Cisco*
 26 *Systems, Inc. v. Arista Networks, Inc.*, Case No. 4:14-cv-5343 (N.D.Cal.) (“Infringement Litigation”).
 27 ECF No. 1, Complaint For Patent Infringement, Infringement Litigation Complaint (N.D.Cal. Dec. 5,
 28 2014) (“Infringement Litigation Complaint”). Days later, Cisco asserted those same patents in the

1 International Trade Commission (“ITC”), against the same specific switch features.¹ The ITC
 2 determined that Cisco’s asserted patents (the same patents Cisco now seeks to litigate *as a group*
 3 before this Court in the antitrust trial) were too numerous and different to handle in a single
 4 investigation, and denied a motion to consolidate them such that two separate Investigations were
 5 handled by two different Administrative Law Judges. Ex. ², Order No. 4, *In the Matter of Certain*
 6 *Network Devices, Related Software and Components Thereof (I)*, Inv. No. 337-TA-944 (Feb. 13,
 7 2015). On August 22, 2016, following a finding that 3 of the 6 patents asserted by Cisco were
 8 infringed by Arista switches in ITC Investigation No. 337-TA-944, a Limited Exclusion Order and a
 9 Cease and Desist Order went into effect (“944 Orders”). Amended Complaint, ¶¶ 103-04; Answer, ¶¶
 10 103-04; ECF No. 110-8, Initial Determination, *In the Matter of Certain Network Devices, Related*
 11 *Software and Components Thereof (I)*, Inv. No. 337-TA-944 (Feb. 2, 2016; public version issued
 12 March 2, 2016). On May 4, 2017, following a finding that 2 of the 6 patents asserted by Cisco were
 13 infringed by Arista switches in ITC Investigation No. 337-TA-945, a second Limited Exclusion Order
 14 and a Cease and Desist Order went into effect (“945 Orders”) (collectively, “ITC Orders”). Amended
 15 Complaint, ¶¶ 103-04; Answer, ¶¶ 103-04; ECF No. 110-13, Initial Determination, *In the Matter of*
 16 *Certain Network Devices, Related Software and Components Thereof (II)*, Inv. No. 337-TA-945
 17 (Dec. 9, 2016; public version issued January 9, 2017).

18 As a consequence of the ITC Orders, Arista introduced redesigned products that either
 19 dropped the features found to infringe, or redesigned them so they cannot infringe. Amended
 20 Complaint, ¶¶ 103-04. U.S. Customs and Border Protection found that Arista’s redesigned products
 21 did not violate the 944 Orders on April 7, 2017, and confirmed that Arista’s redesigned products were
 22 permitted to enter the United States under the 945 Orders on October 12, 2017, based on a Federal
 23 Circuit order. *Id.* Proceedings before the ITC are ongoing. *Id.* Moreover, the two patents found to
 24 have been infringed in the 945 case have been found invalid following *inter partes review*

25
 26 ¹ As a result, the district court action has been stayed until the determinations in the ITC investigations
 27 become final. Order Granting Arista Networks, Inc.’s Unopposed Motion For Mandatory Stay Of
 Proceedings, Infringement Litigation, ECF No. 34 (N.D.Cal. Feb. 10, 2015) (“Stay Order”).

28 ² All references to “Ex.” are references to the exhibits to the Gerrity Decl., filed herewith.

1 proceedings before the Patent Trial and Appeal Board. *Id.*, ¶ 104.

2 **C. The Court Denied In Relevant Part Cisco's Motion to Dismiss Based On**
 3 **Standing**

4 On March 23, 2017, Cisco filed a renewed motion to dismiss Arista's antitrust Complaint,
 5 including on the basis that Arista did not suffer an antitrust injury because Arista is "**barred**" from
 6 selling" its Ethernet switches "in the United States by the ITC's orders" and Arista's sales of Ethernet
 7 Switches were "unlawful" because they infringed Cisco's patents. ECF No. 110, Defendant Cisco
 8 Systems, Inc.'s Motion to Dismiss the Complaint at 7-9.

9 This Court denied these portions of Cisco's motion on October 10, 2017. *See Order*. The
 10 Court found that "[t]here are a few problems with Cisco's argument" related to patent infringement as
 11 a bar to standing. *Id.* at 8. The Court "d[id] not agree with Cisco's premise," that "Arista's sales were
 12 unlawful from the start because the ITC found those switches to be infringing products" "and therefore
 13 f[ound] that antitrust standing has been alleged." *Id.* at 8. Specifically, the Court found that: "there
 14 has been no binding determination that Arista is an infringer"; the Court was not required to "accept
 15 as true that Arista infringed Cisco's patents"; "Cisco fails to show that Arista did not suffer antitrust
 16 injury"; that taking the allegations of the Complaint as true, "Arista has antitrust standing by suffering
 17 antitrust injury during the period before the effective dates of the ITC orders"; and "the ITC orders
 18 cannot negate Arista's antitrust injury that it suffered before their effective dates." *Id.* at 8, 10, 13-16.
 19 The Court also found that while Cisco "contend[ed] that Arista had no right to sell the excluded
 20 products '*before or after*' the ITC orders issued because the products are subject to the orders,"
 21 "Cisco fails to establish that Arista had no right to sell its Ethernet switches before the ITC orders
 22 issued or that the ITC even has authority over past sales." *Id.* at 14. Accordingly, the Court denied
 23 Cisco's standing arguments, finding that the ITC's decisions were not binding determinations that
 24 Arista was an infringer, and conditioned Cisco's ability to re-raise the issue of lack of antitrust
 25 standing due to patent infringement on the necessity of a finding that "patent infringement is **found** to
 26 cover all of Arista's products." *Id.* at 13 (emphasis added).

27 Because the Court was "not reviewing a pleading alleging patent infringement," *id.* at 10, the
 28 Court did not rule on the question of whether a finding of patent infringement precludes standing to

1 assert an antitrust claim against a monopolist—a ruling which Cisco avidly sought. However, the
 2 Court expressed skepticism regarding Cisco’s argument both in view of the controlling authority, and
 3 with respect to Cisco’s cited authority. First, the Court noted that the Ninth Circuit’s decision in
 4 “*Memorex* held that ‘illegality is not to be recognized as a defense to an antitrust action when the
 5 illegal acts by the plaintiff are directed against the defendant.’” *Id.* at 9-10 (quoting *Memorex*, 555
 6 F.2d at 1382-83). Although the Court did not reach Cisco’s argument that *Memorex* was inapplicable
 7 because “Arista infringed a ‘publicly issued’ patent right,” (*id.* at 10 n.3), the Court did find that
 8 Cisco’s conclusion that “*Memorex* is distinguishable and Arista did not suffer antitrust injury because
 9 it committed a public wrong” was “incorrect” because “*Memorex* accepted that the antitrust plaintiff
 10 committed a wrong.” *Id.* at 10.

11 Second, Cisco’s cited authority in support of its argument that patent infringement findings
 12 deprive plaintiffs of antitrust standing fared no better: the Court found that while “Cisco relies on
 13 several cases that held a party lacked antitrust standing for engaging in unlawful conduct or for
 14 having an inability to participate in the market,” the Court was “not convinced that those cases are
 15 applicable here.” *Id.* at 12. For example, Cisco had identified a case in its motion to dismiss— a case
 16 from outside of this circuit that has never been followed by any court in the thirty years since it issued
 17 and that conflicts with the law of this circuit –finding that patent infringement is a defense to an
 18 antitrust claim: *Monarch Marking Sys., Inc. v. Duncan Parking Meter Maint. Co.* (“*Monarch I*”), No.
 19 82 C 2599, 1988 U.S. Dist. LEXIS 390 (N.D. Ill. Jan. 14, 1988); *Monarch Marking Sys., Inc. v.*
 20 *Duncan Parking Meter Maint. Co.* (“*Monarch II*”), No. 82 C 2599, 1988 U.S. Dist. LEXIS 2041
 21 (N.D. Ill. Mar. 4, 1988) (collectively “*Monarch*”). While the Court concluded that it “need not decide
 22 here whether a patent infringer is always barred from asserting antitrust claims against the patent
 23 owner, where the infringer sold only infringing products,” the Court was “doubtful that *Monarch*
 24 clearly stands for such a proposition.” Order at 11. The Court also found that “Cisco’s proposition
 25 that *Monarch* stands for a brightline rule—that an infringer with no non-infringing products has no
 26 standing whatsoever—may be in conflict with the fact that § 16 requires a showing of only threatened
 27 loss and that a potential competitor can suffer injury.” *Id.*

28 **D. Cisco’s Assertion of a “Patent Infringement” Affirmative Defense Following**

The Court's Order

Following the Court’s Order, Cisco answered on October 24, 2017. ECF No. 155, Answer to Complaint. Pursuant to the Court’s Order, Arista filed an Amended Complaint on October 31, 2017. *See* Amended Complaint. Cisco answered that Amended Complaint on November 14, 2017. *See* Answer.

Contrary to the Court’s Order finding that Arista had standing and that Cisco could only re-raise the issue of lack of antitrust standing due to patent infringement “in the event that patent infringement is found to cover all of Arista’s products,” Order at 13, Cisco’s Answer to the Amended Complaint included a first affirmative defense that “Arista lacks standing to bring claims for antitrust violations” because Arista is “barred from participating in the market by orders from the [ITC]” and Arista’s Ethernet switches and their sale infringed one of the eleven patents identified in the Answer. Answer, ¶¶ 134-35. The patents identified in Cisco’s Answer are all presently being asserted by Cisco in the co-pending, stayed Infringement Litigation. See Infringement Litigation Complaint.

Lest there be any doubt as to what Cisco’s “patent infringement” affirmative defense means for this antitrust case, Cisco has made it clear that it intends to litigate patent infringement for each of these eleven patents based on the assertion of this affirmative defense. For example, Cisco has disclosed four technical experts: Kevin Almeroth, Bobby Bhattacharjee, Kevin Jeffay, and Stephen Wicker. Ex. 2 (November 3, 2017, email from counsel for Cisco). Cisco has also informed counsel for Arista that it intends to submit expert reports regarding infringement on December 18, pursuant to the schedule for expert disclosure. *See* Gerrity Decl., ¶ 5.

IV. LEGAL STANDARD

“Federal Rule of Civil Procedure 12(f) permits a court to ‘strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.’” *Savage v. Citibank N.A.*, No. 14-cv-03633-BLF, 2015 U.S. Dist. LEXIS 107501, at *3 (N.D. Cal. Aug. 14, 2015). “The function of a motion made under this rule is ‘to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.’” *Id.* (quoting *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)).

¹⁰ The Ninth Circuit previously affirmed the granting of a motion to strike an affirmative

1 defense, similar to Cisco's, asserting that the plaintiff did not sustain an antitrust injury because of an
 2 "unlawful market presence." *Memorex*, 555 F.2d at 1380. In that case, the alleged illegality was trade
 3 secret theft. *Id.* at 1382. In that case the Ninth Circuit also precluded the defendant from
 4 "introduc[ing] evidence relating to the alleged theft of trade secrets to show the fact of such theft" or
 5 "us[ing] this evidence to reduce damages." *Id.* at 1384 & n.8. "Our holding - that illegality is not to be
 6 recognized as a defense to an antitrust action when the illegal acts by the plaintiffs are directed
 7 against the defendant – ***bars the use of this evidence in this context.***" *Id.*

8 "Rule 12(c) provides that '[a]fter the pleadings are closed — but early enough not to delay
 9 trial — a party may move for judgment on the pleadings.'" *Tyson v. Bank of Am. N.A.*, No. 15-cv-
 10 01548-BLF, 2016 U.S. Dist. LEXIS 99774, at *4 (N.D. Cal. July 29, 2016). "'A judgment on the
 11 pleadings is properly granted when, taking all allegations in the pleadings as true, the moving party is
 12 entitled to judgment as a matter of law.'" *Id.* (quoting *Enron Oil Trading & Transp. Co. v. Walbrook*
 13 *Ins. Co.*, 132 F.3d 526, 528 (9th Cir. 1997)). A court may "'consider certain materials—documents
 14 attached to the complaint, documents incorporated by reference in the complaint, or matters of
 15 judicial notice—without converting the motion to dismiss into a motion for summary judgment.'" *Id.*
 16 at *4-5 (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)). It is appropriate for the
 17 Court to take judicial notice of "court documents that are matters of public record." *Id.* at *5. A
 18 separate request for the Court to take judicial notice of such court documents is being filed
 19 concurrently herewith.

20 "Courts in this district apply the heightened pleading standards of *Twombly* and *Iqbal* to
 21 affirmative defenses when adjudicating a motion to strike." *Camacho v. Jefferson Capital Sys., LLC*,
 22 No. 14-cv-02728-BLF, 2014 U.S. Dist. LEXIS 141216, at *3 (N.D. Cal. Oct. 2, 2014). "Defenses can
 23 be stricken when they fail to give a plaintiff fair notice of the defense asserted." *Id.* (internal quotation
 24 marks omitted). "An affirmative defense must point to ***some identifiable fact*** that if applicable . . .
 25 would make the affirmative defense plausible on its face." *Id.* at *4-5 (internal quotation marks
 26 omitted). "[B]are statements reciting mere legal conclusions may not be sufficient." *Id.* at *3 (internal
 27 quotation marks omitted).

28 **V. ARGUMENT**

1 **A. Lack of Standing Is Not An Affirmative Defense**

2 Cisco's first affirmative defense that "Arista lacks standing" (Answer, ¶ 134) should be
 3 stricken for the simple and indisputable reason that lack of standing is not an affirmative defense, as
 4 courts of this district have repeatedly found. *ABC Distrib. v. Living Essentials LLC*, No. 15-cv-02064
 5 NC, 2016 U.S. Dist. LEXIS 185992, at *6 (N.D. Cal. Apr. 26, 2016) ("Lack of standing: This is not
 6 an affirmative defense, so the motion to strike is granted without leave to amend."); *Perez v. Gordon*
 7 & *Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 U.S. Dist. LEXIS 41080, at *41 (N.D. Cal.
 8 Mar. 26, 2012) ("Likewise, Defendants' fifteenth affirmative defense, that 'Plaintiff lacks standing to
 9 pursue the claims asserted in this action,' is not an affirmative defense . . . [T]he Court strikes
 10 Defendants' . . . fifteenth affirmative defense[.]"); *Ansari v. Elec. Document Processing, Inc.*, No.
 11 5:12-CV-01245-LHK, 2012 U.S. Dist. LEXIS 128622, at *15 (N.D. Cal. Sep. 10, 2012)
 12 ("Defendants' twentieth affirmative defense regarding Plaintiff's alleged lack of standing is also not
 13 an affirmative defense . . . Accordingly, the Court strikes Defendants' . . . twentieth . . . affirmative
 14 defense[.]"). Cisco's assertion of this "affirmative defense" is no different, and should be stricken.

15 **B. Under The Reasoning of Controlling Ninth Circuit Authority, Patent
 16 Infringement Does Not Eliminate Standing Or Antitrust Injury**

17 More fundamentally, Cisco's affirmative defense that Arista lacks antitrust standing and
 18 antitrust injury based on patent infringement is also barred by the Ninth Circuit's controlling
 19 authority, *Memorex*. While the Court determined, in connection with Cisco's motion to dismiss, that
 20 it did not need to resolve whether patent infringement could be raised as a defense to an antitrust
 21 claim, that question is now squarely before the Court because Cisco has raised a purported
 22 affirmative defense to Arista's antitrust claim based on patent infringement. This was the position
 23 raised by the defendants in *Memorex*, and the Court should reach the same result and strike Cisco's
 24 affirmative defense.

25 In *Memorex*, plaintiff Memorex had sued defendant IBM for antitrust violations, and IBM had
 26 asserted an affirmative defense that Memorex "maintained an 'unlawful market presence'" based on
 27 the "systematic theft of IBM trade secrets," and thus "could not have sustained any 'injury'"
 28 cognizable under § 4 of the Clayton Act." *Memorex*, 555 F.2d at 1380-81. Memorex moved to strike

1 this affirmative defense, the district court granted that motion, and that decision was appealed to the
 2 Ninth Circuit. *Id.* As this Court has observed, the *Memorex* Court held that “illegality is not to be
 3 recognized as a defense to an antitrust action when the illegal acts by the plaintiff are directed against
 4 the defendant.” Order at 9 (quoting *Memorex*, 555 F.2d at 1382–83). The *Memorex* Court’s
 5 reasoning was widely applicable and was not limited to trade secret theft:

6 A wrongful act committed against one who violates the antitrust laws ***must not become a shield in the violator's hands*** against operation of the antitrust laws.
 7 This is particularly true when the ***defendant has other remedies available to him***.

8 *Memorex*, 555 F.2d at 1382 (emphasis added). In summary, the Ninth Circuit held that when the
 9 plaintiff has committed an illegal or wrongful act ***against the defendant***, and in particular one for
 10 which the defendant had a remedy, that act does not provide a defense to an antitrust claim, and that
 11 conduct does not act as a “shield” that immunizes an antitrust violator from the consequences of its
 12 wrongful acts. *Id.* Not only was the affirmative defense stricken in *Memorex* on this basis, but the
 13 Ninth Circuit precluded the defendant from “introduc[ing] evidence relating to the alleged theft of
 14 trade secrets to show the fact of such theft” or “us[ing] this evidence to reduce damages.” *Id.* at 1384
 15 & n.8. “Our holding - that illegality is not to be recognized as a defense to an antitrust action when the
 16 illegal acts by the plaintiffs are directed against the defendant – ***bars the use of this evidence in this context***.” *Id.*; see also *First Beverages, Inc. v. Royal Crown Cola Co.*, 612 F.2d 1164, 1175 (9th Cir.
 17 1980) (explaining that the “point” of *Memorex*’s evidentiary bar “is that where the illegal act by the
 18 plaintiff is ***directed against the defendant***, the defendant should not use this fact to reduce his liability
 19 for his own breach of public policy, but should bring a ***counterclaim based on the plaintiff's breach of public policy***.”) The *Memorex* holding was not limited to trade secret theft, and in fact *Memorex*
 20 specifically noted that trade secret theft was just an example of the type of wrong that its holding
 21 covered: “wrongs against the defendant, ***such as*** the theft of trade secrets, will not bar the plaintiff’s
 22 antitrust action.” *Memorex*, 555 F.2d at 1382 n.5.

23 *Memorex* bars Cisco’s assertion of “patent infringement” as an affirmative defense to standing
 24 here. Like the defendant in *Memorex*, Cisco claims Arista has no standing due to acts “directed
 25 against the defendant,” and *Memorex* bars such claims. Infringement of an antitrust violator’s patents
 26 is an act “directed against the defendant” (and therefore does not preclude antitrust standing) first and
 27

1 foremost because the patent owner's remedy for patent infringement is a private civil claim or
 2 counterclaim against the infringer. 1-OV Chisum on Patents 1 (2017) ("A patent owner may file a
 3 civil suit for infringement against anyone who, without authority, makes, uses or sells the patented
 4 invention. Remedies for infringement include . . ."). In *Memorex*, "the alleged theft by Memorex of
 5 IBM's trade secrets is not a bar to Memorex's antitrust action," as the defendant could have asserted a
 6 claim "for the alleged misappropriation" to obtain a "setoff" against the plaintiff's recovery on the
 7 antitrust claim, instead of "asserting that Memorex does not have any cause of action at all."
 8 *Memorex*, 555 F.2d at 1382-83. Here too, Cisco has a remedy for any alleged violation of its patent
 9 rights in the form of a patent infringement claim, which Cisco has already filed in the Infringement
 10 Litigations. Any recovery in the Infringement Litigation will in effect be a "setoff" against Arista's
 11 antitrust recovery, and there is no need to shield a defendant from an antitrust claim based on patent
 12 infringement when the defendant will be made whole by bringing a patent infringement claim.
 13 Cisco's patent infringement claims thereby fall squarely within the holding of *Memorex*, which
 14 precludes their use either as a defense against an antitrust claim or as evidence to reduce damages.

15 The nature of the patent right itself further confirms that acts of patent infringement are
 16 "directed against the defendant" and therefore do not bar standing under *Memorex*. *Id.* A patent
 17 "confers the right to exclude others from making, using, or selling the claimed invention" and has
 18 "attributes of personal property." 1-OV Chisum on Patents 1 (2017). Thus, patent infringement is a
 19 harm to the patent holder's right to exclude, which is directed against the patent owner in the same
 20 way that an act that harms an owner's personal property right to exclude—such as theft—is a wrong
 21 against the individual who owns that property.

22 *Memorex* itself confirms that patent infringement should be precluded in suggesting
 23 intentional theft of patented technology would not change its decision. *Memorex*, 555 F.2d at 1382.

24 **1. Cisco Cannot Avoid *Memorex* By Characterizing Patent Infringement
 25 as a "Public Wrong"**

26 Cisco has sought to escape the consequences of *Memorex* by arguing that the theft of trade
 27 secrets in *Memorex* is a "private wrong"—which even Cisco concedes *Memorex* disposes of—while
 28 "Arista infringed a 'publicly issued' patent right." Order at 10. Cisco's reliance on that purported

distinction, based on the *Memorex* Court's observation that a "defendant who violates the antitrust laws has committed a public wrong," while a "private wrong done by a potential plaintiff should not prevent that party, who may be the only party with standing to sue, from taking action under the antitrust laws," is entirely misplaced. *Memorex*, 555 F.2d at 1382. The court's **holding** in *Memorex* made no mention of "private wrongs." To the contrary, the focus of the *Memorex* holding was on whether there was a wrong against the defendant for which the defendant has a separately available remedy, not whether it was a "private wrong":

This does not mean that any violation of a law by a plaintiff will not bar an action. If, for example, a plaintiff participates in an illegal conspiracy to restrain trade - ***an act not directed against the defendant*** - then his conduct must be evaluated under different standards. What ***we are holding today is that wrongs against the defendant***, such as the theft of trade secrets, will not bar the plaintiff's antitrust action.

Memorex, 555 F.2d at 1382 n.5 (emphasis added). In this explanation, the Ninth Circuit distinguished acts that were not directed against the defendant, from "wrongs" that are against the defendant. *Id.*

The Ninth Circuit's decision in *First Beverages* confirmed that *Memorex* stands for the proposition that acts against the defendant for which the defendant has a remedy are not a defense to an antitrust claim and that *Memorex* did not turn on any distinction between public and private wrongs. *First Beverages* considered whether *Memorex* applied to the plaintiff's illegal conduct at issue in *First Beverages*, and concluded that it did not where "the plaintiff's illegal conduct was not ***directed at the defendant***" and the defendant had "***no claim or counterclaim*** based on the [conduct]." *First Beverages*, 612 F.2d at 1174-75. *First Beverages* did not distinguish *Memorex* based on whether the wrong at issue in *First Beverages* was public or private, and to the contrary recognized that a ***public wrong*** could fall within the scope of *Memorex*:

The point of this footnote [in *Memorex*] is that where the illegal act by the plaintiff is directed against the defendant, the defendant should not use this fact to reduce his liability for his own breach of public policy, but should bring a counterclaim based on the plaintiff's breach of public policy. Then ***both public wrongs may be formally vindicated***, instead of only one or neither.

Id. Cisco has already asserted its "counterclaim" regarding infringement of its patents, in separate and different actions. Doing so here is not only contrary to law, but redundant and wasteful of the court's

1 resources, and Cisco has no basis to argue that a “publicly issued” patent does not fall within the
 2 scope of *Memorex*.

3 Even if the Court finds that there is some component of the act of patent infringement that is
 4 “public”—despite the availability of a civil remedy for the defendant—for instance, because a patent
 5 is “publicly issued,” *see Order at 10*, nothing in *Memorex* and the decisions following it suggest such
 6 an act can bar an antitrust claim. Even acts covered by unclean hands and *in pari delicto* that are not
 7 against the defendant “cannot completely and automatically bar [plaintiff’s antitrust] claim;” “[t]he
 8 plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the
 9 defendant, but the law encourages his suit to further the overriding public policy in favor of
 10 competition.” *First Beverages*, 612 F.2d at 1174 (quoting *Perma Life Mufflers, Inc. v. International*
 11 *Parts Corp.*, 392 U.S. 134, 139 (1968)).

12 **2. Cisco’s Reliance on *Monarch* Is Misplaced**

13 For its motion to dismiss, Cisco relied on the *Monarch* district court decisions from outside
 14 the Ninth Circuit that have never been followed in the thirty years since they issued to argue that,
 15 despite the clear holding of *Memorex*, a finding of patent infringement should defeat antitrust
 16 standing. In that context, the Court found that it was “doubtful that *Monarch* clearly stands” for the
 17 proposition asserted by Cisco that “a patent infringer is always barred from asserting antitrust claims
 18 against the patent owner, where the infringer sold only infringing products.” *Order at 11*. The Court’s
 19 finding was the correct one. First, to the extent that *Monarch* is inconsistent with *Memorex*, *Memorex*
 20 is the controlling authority in this Circuit, and its holding prevents Cisco from asserting its “patent
 21 infringement” affirmative defense. More fundamentally, *Monarch* does not stand for the proposition
 22 that patent infringers are barred from antitrust standing. At most, *Monarch* stands for the proposition,
 23 like similar decisions, that where a plaintiff’s entire business is unlawful, such plaintiffs have no
 24 standing to assert antitrust claims.

25 In *Monarch*, the plaintiff asserted patent infringement, and the defendant brought an antitrust
 26 counterclaim. *Monarch I*, 1988 U.S. Dist. LEXIS 390 at *1. The antitrust counterclaim was dismissed
 27 in *Monarch I* “[b]ased on the defendant’s representation conceding patent validity and infringement,”
 28 and “the court held that the defendant had no market interest in the patented labels and did not suffer

1 injury.” See Order at 11. The primary basis asserted in *Monarch I* to distinguish *Memorex* was that
 2 *Monarch I* “does not involve allegations of trade secret theft on the part of the antitrust plaintiff, but
 3 involves a claim of patent infringement.” *Monarch I*, 1988 U.S. Dist. LEXIS 390 at *11. But
 4 *Monarch I* never explains why patent infringement is distinguishable from trade secret theft under the
 5 reasoning of *Memorex*; as described *supra*, it is a distinction without a difference. Like trade secret
 6 misappropriation, patent infringement is an act directed against the defendant for which the defendant
 7 has a civil remedy. To the extent *Monarch* suggests otherwise, it should be given no weight in this
 8 circuit because it is inconsistent with *Memorex*.

9 **3. At Most, *Monarch* Stands For The Proposition that Patent
 10 Infringement May Be A Defense To An Antitrust Claim When The
 11 Infringed Patents Control Participation In the Market, Which Cisco
 12 Cannot Establish**

13 While the Court’s Order did not need to decide “whether a patent infringer is always barred
 14 from asserting antitrust claims against the patent owner, where the infringer sold only infringing
 15 products,” the Court was rightfully “doubtful that *Monarch* clearly stands for such a proposition.”
 16 Order at 11. The holding of *Monarch* was narrower than this. In *Monarch I*, the infringing product
 17 was a simple label for use in defendant’s hand-held labelers, and the patents at issue covered that
 18 entire product. As the court in *Monarch* described, the patents at issue covered “certain pressure-
 19 sensitive price labels which are sold for use in [plaintiff’s] hand-held labelers.” *Monarch I*, 1988 U.S.
 20 Dist. LEXIS 390 at *1. The court’s decision was driven by its understanding that practicing the patent
 21 was necessary for the would-be antitrust claimant to participate in the market at all. *Id.* at *12
 22 (claimant “cannot be permitted to recover damages as a result of Monarch’s alleged monopolization
 23 of the market for certain types of labels when Monarch’s label patents gave it a **legal right to exclude**
 24 ***all other manufacturers from producing and selling those types of labels.***”). When it became
 25 apparent in *Monarch II* that the claimant also sold non-infringing labels, the district court reinstated
 26 the antitrust claim. *Monarch II*, 1988 U.S. Dist. LEXIS 2041, at *1-3. As such, *Monarch* held only
 27 that where patent infringement is found to prevent participation in the market altogether, there may
 28

1 not be an antitrust injury or antitrust standing.³

2 Cisco's patents do not control participation in the relevant switch markets, and Cisco's
 3 Answer does not plead that they do. To the contrary, Cisco's Answer implicitly admits that its patents
 4 do not control entry into and participation in those markets, because it asserts, as its Fourth
 5 Affirmative Defense, that "Cisco has never had, and does not have a dangerous probability of
 6 attaining, monopoly power in any relevant market." ECF No. 155, Answer, ¶ 188.

7 Cisco's Answer further demonstrates that its asserted patents cover only narrow features of a
 8 complex multi-feature Ethernet Switch – none of which is a bar to Arista's participation in the
 9 claimed switch markets. Cisco's admissions in its Answer show that switches are technologically
 10 complex devices with numerous features, including a command line interface, configurable features,
 11 and hardware and software for transferring information. *See, e.g.*, Answer, ¶ 11 (Ethernet switches
 12 "may connect computers, servers, storage, and other devices together to form a network."); ¶ 33
 13 (Ethernet switches are a "component of modern local area networks and may be used to enable
 14 network components to communicate."); ¶ 16 (Ethernet Switches may be "used in data centers," used
 15 "in concert with other networking components," and used "to support cloud services" and may
 16 "operate at various speeds"); ¶ 36 (Ethernet switches may operate to "transfer information using
 17 physical addresses," and "certain network components may incorporate both switching and routing
 18 functionality."). Thus, it is clear from even Cisco's admissions that Ethernet switches are
 19 technologically complex, configurable computing devices with multiple features, and intended for use

20
 21 ³ Monarch's holding is consistent with *Ethypharm S.A. Fr. v. Abbott Labs*, 707 F.3d 223 (3rd Cir. 2013), in which there was no antitrust standing because the entire product and all relevant products
 22 were not on the market. In *Ethypharm*, "the plaintiff was not a competitor in the United States because
 23 the plaintiff, by its own choice, did not directly sell in the U.S. market as evidenced by not obtaining
 24 FDA approval." Order at 12. Monarch's holding is also consistent with *Pearl*, in which, "the plaintiff
 25 [wa]s engaged **in a business** which [wa]s, by its very nature, **entirely illegal**" and "[t]he almost **total
 26 magnitude** of this illegal conduct by plaintiffs makes their minuscule conduct that may be legal,
 27 insignificant, and, in any event, none of such minuscule and possibly legal conduct rises to **the level of
 the legitimate activities** of Memorex." *Pearl Music Co., v. Recording Industry Asso.*, 460 F. Supp.
 1060, 1067-68 (C.D. Cal. Nov. 15, 1978). Applying the reasoning of *Pearl* to a case involving patent
 infringement, the presence of significant non-infringing features in a product would provide a level of
 legitimate activities at least comparable to those in *Memorex*.

1 in different computing scenarios.

2 Cisco's Answer also makes it clear that the patents identified in Cisco's "patent infringement" 3 affirmative defense cover only specific features of these multi-feature products. For each patent 4 identified in Cisco's Answer, Cisco identifies a specific feature or functionality in the multi-feature 5 accused products that are covered by the identified patent. Specifically, the accused products that 6 Cisco identifies are those that implement "access control list functionality," "process manager 7 functionality," "SysDB functionality," "multi-chassis link aggregation, or MLAG," "zero-touch 8 provisioning, or ZTP," "private VLAN functionality," "loop guard functionality," and "control plane 9 policing, or CoPP." *Id.*, ¶¶ 138, 142, 146, 150, 152, 154, 156, 158, 160, 162, 164. Even accepting, as 10 Cisco asserts, that these features or functionalities are "covered by" the claims of the identified 11 patents, *id.*, it is clear that the scope of the patents is different from the scope of the patents in 12 *Monarch*. Instead of covering the entire product as the patents in *Monarch* did, Cisco's patents cover 13 individual features of a complex multi-feature device. There is no indication—including based on the 14 description of Ethernet Switches in Cisco's Answer—that the patents identified in the affirmative 15 defense cover all features of an Ethernet switch, or are required components for participation in the 16 relevant markets. As such, even under *Monarch*, infringement of Cisco's narrow, feature-specific 17 patents cannot deprive Arista of antitrust standing, and Cisco's "patent infringement" affirmative 18 defense should be stricken.

19 **4. Barring Standing to Assert Antitrust Claims Because of Patent
20 Infringement Would Undermine The Antitrust Laws**

21 There are sound, common sense reasons why *Memorex*, rather than Cisco's extreme reading 22 of *Monarch*, should be dispositive of Cisco's affirmative defense. Reading *Memorex* or *Monarch* to 23 allow any instance of patent infringement to be a defense against an antitrust claim would turn 24 antitrust law on its head. If a monopolist is permitted to immunize its antitrust conduct by asserting 25 patent infringement against its victims, technologically sophisticated companies like Cisco with over 26 10,000 U.S. patents would never face the consequences of their anticompetitive acts. *See Ex. 3,* 27 available at <https://blogs.cisco.com/news/10000-u-s-patents-down-and-thanks-to-our-amazing-innovators-many-more-to-come>. Conversely, if infringement of any patent destroyed antitrust 28

1 standing, few companies selling technologically sophisticated, multi-functional products could ever
 2 have standing to bring an antitrust suit to stop anticompetitive conduct harming the market, given the
 3 prevalence of patent infringement litigation (including assertions by non-practicing entities) in the
 4 United States. This is directly contrary to the policy of encouraging antitrust suits, regardless of the
 5 culpability of the antitrust plaintiff. *See First Beverages*, 612 F.2d at 1174 (“The plaintiff who reaps
 6 the reward of treble damages may be no less morally reprehensible than the defendant, but the law
 7 encourages his suit to further the overriding public policy in favor of competition.”” (quoting *Perma*
 8 *Life*, 392 U.S. at 139)).

9 This problem will be particularly acute when the antitrust cause of action relates to the use of
 10 patents to violate the antitrust laws. For example, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297
 11 (3d Cir. 2007), held that a plaintiff had stated a claim for monopolization by inducing standard
 12 organizations to include the defendant’s patented technology as an essential element of the standard
 13 by “by falsely promising to license its patents on FRAND terms, and then reneging on those promises
 14 after it succeeded in having its technology included in the standard.” *Id.* at 303, 306, 315; *see also*
 15 generally *Funai Electric Co. v. LSI Corp.*, No. 16-cv-01210, 2017 U.S. Dist. LEXIS 44866, at *15-16
 16 (N.D. Cal. Mar. 27, 2017) (applying *Broadcom*) (Freeman, J.). If the holding of *Monarch* were
 17 applied to such a case, all that the patent holder would need to do to defeat the antitrust claim would
 18 be to show that the plaintiff practiced the portion of the standard covered by the patent. This would
 19 mean that all participants in the market practicing the standard would be barred from bringing the
 20 *Broadcom* antitrust claim, and private causes of action bringing this claim would be essentially
 21 unavailable.

22 The general principle that applies to antitrust claims related to the use of patents—as stated by
 23 the Supreme Court—is that “so long as the patent owner is using his patent in violation of
 24 the antitrust laws, he ***cannot restrain infringement of it by others.***” *Hartford-Empire Co. v. United*
 25 *States*, 323 U.S. 386, 415 (1945); *see also Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 494
 26 (1942) (concluding that a patent infringement complaint was properly dismissed when the patent
 27 owner tied the license to use the patented machine to the purchase of unpatented materials), *overruled*
 28 *in part by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42 (2006) (concluding that tying

1 arrangements can no longer be evaluated under the *per se* rule applied in *Morton Salt*, although tying
 2 arrangements may still be unlawful); 6A-19 Chisum on Patents § 19.04 (2017) (“If such misuse is
 3 found, the courts will withhold any remedy for infringement or breach of a license agreement—even
 4 against an infringer who is not harmed by the abusive practice,” and “[u]se of a patent to violate the
 5 antitrust laws will constitute misuse.”). And yet the court in *Monarch I* concluded that in a case where
 6 the patent owner is using the patent in violation of the antitrust laws, ***infringement eliminates the***
antitrust claim. *Monarch I*, 1988 U.S. Dist. LEXIS 390, *14 (concluding “***even assuming that***
 7 ***Monarch has engaged in unlawful tying,*** Powers, ***because of its infringement*** of Monarch’s label
 8 ***patents, has sustained no antitrust injury***” (emphasis added)). These results are in direct conflict.
 9 Under the Supreme Court’s rule, if there is infringement and an antitrust violation, infringement
 10 cannot be asserted. Under a broad reading of *Monarch*, if there is infringement and an antitrust
 11 violation, the antitrust claim cannot be asserted. Thus, the holding of *Monarch* is either wrong, or
 12 must be read very narrowly so as not to destroy the balance that the Supreme Court has established
 13 between patent law and antitrust law.

14 *Monarch*’s holding itself conflicts with general principles of antitrust law. This Court rightly
 15 noted that “Cisco’s proposition that *Monarch* stands for a brightline rule—that an infringer with no
 16 non-infringing products has no standing whatsoever—may be in conflict with the fact that § 16
 17 requires a showing of only threatened loss and that a potential competitor can suffer injury.” Order at
 18 11. As the Court already noted, while § 4 of the Clayton Act allows the recovery of damages, § 16
 19 permits injunctive relief. 15 U.S.C. §§ 15, 26. The antitrust standing requirement is lower for
 20 injunctive relief than it is for damages. *See* Order at 7 (citing *Feitelson v. Google Inc.*, 80 F. Supp. 3d
 21 1019, 1026-27 (N.D. Cal. 2015)); *see also Freeman v. San Diego Association of Realtors*, 322 F. 3d
 22 1133, 1145 (9th Cir. 2003) (threatened injury is sufficient for indirect purchaser claims). While
 23 Section 4 requires a showing of “actual injury” and an injury to “business or property,” § 16 requires
 24 only “threatened loss or damage.” *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 (1986).
 25 Cisco’s proposed reading of *Monarch* as barring standing altogether is therefore in direct conflict
 26 with this standard.

27 C. **Striking Cisco’s “Patent Infringement” Affirmative Defense Will Avoid**

1 **Unnecessary Use of this Court’s Resources, And is In Accord With Public**
 2 **Policy**

3 Because infringement of Cisco’s patents cannot be a bar to Arista’s standing to assert antitrust
 4 claims, Cisco’s affirmative defense to the contrary should be stricken. For the same reasons, Cisco
 5 should be precluded from offering evidence of patent infringement to show infringement, as a defense
 6 to the antitrust claim, or to reduce damages, and Arista should be granted partial judgment on the
 7 pleadings that it does not lack antitrust standing or antitrust injury based on patent infringement.
 8 Granting this relief fulfills the function of Rule 12(f), which is to avoid precisely the “expenditure of
 9 time and money” that would arise from litigating such “spurious issues.” *Savage*, 2015 U.S. Dist.
 10 LEXIS 107501 at *3 (quoting *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir.
 11 2010)). As in *Memorex*, precluding Cisco from offering evidence of infringement also avoids the
 12 expense of needlessly litigating patent infringement for 11 separate patents. *See Memorex*, 555 F.2d
 13 at 1384 & n.8 (precluding defendant from “introduc[ing] evidence relating to the alleged theft of trade
 14 secrets to show the fact of such theft,” “us[ing] this evidence to reduce damages,” or using evidence
 15 of illegality “as a defense to an antitrust action”). Granting partial judgment on the pleadings is also
 16 appropriate because as a matter of law Cisco’s allegations of patent infringement cannot eliminate
 17 standing or antitrust injury.

18 The relief that Arista seeks is also appropriate because it eliminates an entirely unnecessary
 19 and duplicative patent infringement “trial” that would be an end-run around the statutory stay of
 20 Cisco’s infringement claims in the Infringement Litigation. Cisco made a strategic litigation *choice* to
 21 delay its relief for patent infringement by pursuing relief in front of the ITC. To the extent that Arista
 22 is found in the Infringement Litigation to have infringed Cisco’s patents, Cisco will be fully
 23 compensated for that infringement on the timeline that Cisco accepted. This antitrust case should
 24 proceed to trial, without needless and redundant proceedings regarding patent infringement, and
 25 Cisco will have the opportunity to “set off” any damages awarded to Arista in a later proceeding. *Cf.*
 26 *Memorex*, 555 F.2d at 1382-83; *First Beverages*, 612 F.2d at 1174-75.

27 Granting the relief that Arista seeks is also consistent with the strong public policy interest in
 28 promoting competition. As the Court concluded in its Order on Cisco’s motion to dismiss, “the

1 inquiry for antitrust injury should focus ***not on infringement*** but how the allegedly injured party is
2 ***related to the market.*** Order at 11 (emphasis added)). Arista has been, and continues to be, harmed
3 in the Relevant Markets due to Cisco's anticompetitive conduct. To allow patent infringement to be a
4 defense to an antitrust claim would ignore what actually occurred in the market.

5 **D. Cisco's Remaining Affirmative Defenses Are Not Adequately Plead And So**
6 **Should Be Stricken**

7 Cisco's second through seventh affirmative defenses are each a single sentence containing no
8 facts to provide notice of the defense or to make the defense plausible. *See Answer, ¶¶ 165-70;*
9 *Camacho*, 2014 U.S. Dist. LEXIS 141216 at *3-5. For example, Cisco's sixth and seventh affirmative
10 defense state only Cisco's legal conclusion that Arista's claims are barred by "the doctrines of claim
11 and issue preclusion" and "the relevant statutes of limitations." *Answer, ¶¶ 169-170.* This does not
12 meet the *Twombly* and *Iqbal* standards that apply to affirmative defenses. *Camacho*, at *3. Arista
13 respectfully requests these affirmative defenses be stricken.

14 **VI. CONCLUSION**

15 For the foregoing reasons, Arista respectfully requests this Court grant its motion.

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Respectfully submitted,

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